

Transparency International Sri Lanka v. Presidential Secretariat

RTICAppeal/06/2017

Appeals heard as part of the meetings of the Commission on 12.06.2017 (RTIC Appeal/05/2017); 19.06.2017 (RTIC Appeal/06/2017); 08.08.2017, 25.09.2017, 06.11.2017; 08.01.2018; 23.02.2018 (delivery of Order on Jurisdiction); 24.04.2018 (amendment of papers by Appellant); 26.06.2018; 04.09.2018 and 30.10.2018

Record of Proceedings and Order On Merits delivered on 4th December 2018

Chairperson: Mr. Mahinda Gammampila
Commission Members: Ms. Kishali Pinto-Jayawardena
Mr. S.G. Punchihewa
Dr. Selvy Thiruchandran
Justice Rohini Walgama

Appellant: Transparency International Sri Lanka
Notice issued to: Secretary to the President, Presidential Secretariat

Information Request filed to Presidential Secretariat on 03.02.2017

Response by Information Officer on 06.03.2017

Appeal filed to Designated Officer on 10.03.2017

Response by Designated Officer on 20.03.2017

Appeal filed to RTI Commission on 19.05.2017

Written Submissions/Further Written Submissions filed on;

(By the Appellant: 25.07.2017, 23.10.2017, 04.01.2018; 08.01.2018; 25. 06. 2018; 25.10.2018; 23.11.2018)

(By the Respondent: Presidential Secretariat: 31.07.2017, 08.09.2017; 03.01.2018; 04.09.2018)

Appearance/ Represented by:

Counsel for the Appellant (appearing at various times during the hearing of the appeal):

Mr. Gehan Goonetilleka, AAL

Ms Sankhitha Guneratne, AAL

Right to Information Commission

Counsel for the PA (Presidential Secretariat):

Mr. Nerin Pulle, Deputy Solicitor General, Department of the Attorney General

Mr. Suren Gnanaraj, State Counsel, Department of the Attorney General

Appellant (TISL) represented by:

Mr. Asoka Obeyesekere, Executive Director, TISL

Lakwijaya Bandara, legal officer, TISL

PA (Presidential Secretariat) represented by :

Ms Luckshmi Jayawickrema, Additional Secretary, (Legal) Presidential Secretariat

Brief Description of the Facts

On 3rd February 2017, the Appellant (Transparency International, Sri Lanka) filed two information requests to the Public Authority (viz; the Presidential Secretariat) under Section 24 (1) of the Act.

The requests were to obtain access to a certified copy of the Declaration of Assets and Liabilities of President Maithripala Sirisena for the years 2015 and 2016 as well as for a certified copy of the Declaration of Assets and Liabilities of Prime Minister Ranil Wickremesinghe for the years 2015 and 2016. At the time, the Appellant had submitted the two information requests to the Secretary to the President on the basis that it was 'unable to obtain the name of the Information Officer' at the respective offices.

The said information request to the Presidential Secretariat were rejected on 6th March 2017 by the Information Officer which refusal was upheld by the Designated Officer of the said Public Authority (the Secretary to the President) on 20th March 2017. Under and in terms of Section 32 (1) of the Act, on 22nd May 2017, this Commission received an appeal from the Appellant dated 19th May 2017 against the decision of the Designated Officer of the Presidential Secretariat.

A jurisdictional issue arose for determination on two preliminary questions of law requiring to be first answered in the Appeal;

- Whether the requirement of averment of citizenship on the part of the information requestor as an organisation is a mandatory requirement in terms of Section 3 (1) of the RTI Act No.12 of 2016 read with Section 43 of the said Act?

- Is the said requirement a fatal irregularity or a curable defect at the second stage of appeal before the Commission?

Several hearings on this matter were held where the Public Authority, represented by the Deputy Solicitor General, the Department of the Attorney General strongly contended that the appeal should be dismissed *in limine* as the Appellant, (being an organisation), would be conferred with 'citizenship status' and thus enabled to file information requests within the meaning of Section 43 of the Act only if it is averred that it is a citizen. Section 43 allows only incorporated or unincorporated bodies whose membership of 'not less than three-fourths' are Sri Lankan citizens to file information requests to a Public Authority.

It was urged that while averring citizenship by an individual may not be a mandatory requirement given the object and purpose of the RTI Act, there was a separate bar imposed on organisations who utilise the Act as that duty was mandatory in those instances and that this goes to the core of whether the Commission will be seized and possessed with jurisdiction to hear and determine an appeal. Further, that same requirement applied in filing appeals to the RTI Commission in terms of Section 32 (1) of the RTI Act as only a citizen has the right of appeal. However the Appellant had failed to aver citizenship either in the original information request or in appeal.

Placing reliance on the Determination of the Supreme Court in SC.SD 19/2016, SCM 23.02.2016) in respect of a Bill titled '*Budgetary Relief Allowance of Workers*', it was argued further for the Respondents that where the Constitution or a statute expressly reserves a right for the exclusive benefit of citizens, that the said right can only be exercised by a citizen. The Appellant submitted that the failure to aver citizenship on its part had not been raised by the respondent officers of the said Public Authorities nor had the Appellant been asked to submit proof of citizenship. In any event, it was claimed that the lapse could be corrected at the appeal stage before the Commission in accordance with Rule 17 relating to Defective Appeals in the Rules of the RTI Commission on Fees and Procedure (viz; Gazette No 2004/66, 2017.02.03).

By Order dated 23rd February 2018, it was determined that jurisdictional defects impugned in the Appeals cannot be cured by recourse to Rule 17 which applies to a situation where an Appeal is deficient on the merits of the substantive matter/s in issue (ie; for instance, where an Appeal is unclear in the factual information that is sought or is lacking relevant documentation in that regard).

However in pursuance of its inherent powers under Section 32 (1) of the Act to determine if the Appellant has a right of appeal in the context of jurisdictional facts (albeit contingent) that must be ascertained and emphasizing that the right of appeal must be preserved to the broadest extent possible, the Appellant was allowed to amend the papers in order to aver citizenship before the Commission. This was to satisfy the caveat as to membership in Section 43 while at the same time, restricting this requirement to organisations in general

and emphasizing that this does not mean that proof of citizenship must be offered, unless in instances where a genuine objective doubt objectively arises as to membership.

Accordingly, the Appellant cured the said defect/s through papers submitted on 24.04.2018. The Appeal was then heard on its merits.

Matters Arising During the Hearing

During subsequent hearings before this Commission, Counsel for the Appellant pointed out that the initial response of the PA to this information request through its Information Officer (IO) dated 6th March 2017, had been to refuse the said information on the basis that the Speaker had ruled that 'any person or organisation is not entitled to receive information relating to the Declarations of Assets and Liabilities of Members of Parliament' under the provisions of the RTI Act.

On appeal, the DO of the Presidential Secretariat (Secretary to the President) had refused the information citing Sections 5(1)(a) and 5(1)(g). It was asserted by the Appellant that the IO had cited a reason not permissible by law in refusing the information in the initial refusal and that the DO, in affirming that refusal, had merely cited sub-sections of Section 5 without setting out specific grounds as required to justify that refusal.

At the outset, a question was posed to both parties by the Commission as the extent to which the Assets Declarations of any person comes with the purview of 'the possession, custody and control' of the Information Officer (IO) and/or Designated Officer (DO) of the Public Authority in terms of Section 3 of the Act.

Counsel for the Appellant submitted that the information is being sought on the assumption that these particular persons who hold public office are statutorily bound to submit to a particular authority and/or on the assumption that the information is in fact, in the PA's possession, custody and control. It was maintained that if the PA did not in fact have the information requested, this matter would have ended with the Information Officer invoking Section 3 in the first instance but the fact that both PAs are invoking grounds of exemption leads to a strong presumption that the information is, in fact, in their possession, custody and control.

It was further argued that Section 3 (1) ought not to be interpreted to mean only that a right to obtain information exists where a PA has statutory authority or a statutory obligation cast upon it to have 'possession, custody or control.' Rather, this should be ascertainable as a matter of fact. If the PA in question happened to have had this information, then the information can be requested. If it did not have the information, then the PA should have responded stating that it did not have the information and directed the

Appellant Organisation to the correct PA or stated that it was unaware as to which PA might have had this information.

Countering that argument, Senior State Counsel representing the PA affirmed that the Attorney General was reiterating the IO's response based on a Ruling made by the Speaker which states that so far as assets declarations are concerned, the applicable law is the Declaration of Assets and Liabilities Law No. 1 of 1975 (as amended) and not the Right to Information Act No 12 of 2016. On direction of the Commission (Vide RTIC Minute of the Record, 26.06.2018), the said Ruling of the Speaker was submitted for our perusal.

It was further submitted that any person who seeks an assets declaration within the framework of the law must do so within the Declaration of Assets and Liabilities Law, No. 1 of 1975 (as amended). This Law (hereafter referred to as DALL) prescribes an 'appropriate authority' to whom such declarations should be given and that the DO named in this appeal (namely the Secretary to the President) is not 'recognised' under Section 4 of the Act as an 'appropriate authority' to whom the Prime Minister should submit his/her declaration of assets and liabilities (Vide paragraph 31 of the Written Submissions of the PA dated, 31/07/2017).

Thus it was contended that a request for information can only be made to a Public Authority having 'possession, custody and control' of the same in terms of Section 3 of the RTI Act, which requirement was not satisfied in this context.

On the substantive grounds in relation to invocation of the exemptions, the Appellant contended that Section 5 (1) (a) is a unique Section; its first limb exempted personal information 'which has no relationship to any public activity or interest' while its second limb exempted personal information which 'would cause unwarranted invasion of the privacy of the individual unless the larger public interest justifies the disclosure of such information or the person concerned has consented in writing to such disclosure'. It was maintained that the core issue before the Commission was if the information sought has no relationship to public activity or interest, or it amounted to disclosure of information that would result in an unwarranted invasion of privacy.

It was argued, in terms of Sri Lanka's Declaration of Assets and Liabilities Act, No. 1 of 1975 (as amended), that the forms utilised for the disclosure of Assets enables an official to declare his/her assets at the point of entering public office and at a point during his/her tenure. Thus it can be ascertained whether or not public funds, resources were misappropriated/ mishandled during that period in the event that an investigation is commenced by the authorities. The Appellant relied on *Lok Prahari Through Its General Secretary S.N. Shukla V Union of India And Others WP (C) 784 of 2015* (paragraph 32 of written submissions on behalf of the Appellant Organisation filed on 25.06.2018), where the Supreme Court stated that,

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The citizen, the ultimate repository of sovereignty in a democracy must have access to all information that enables critical audit of the performance of the State, its instrumentalities and their incumbent or aspiring public officials. It is only through access to such information that the citizen is enabled/empowered to make rational choices as regards those holding or aspiring to hold public offices, of the State.

Citing the above, it was submitted that this caution had been issued in reference to an Assets Declaration which the Court considered, was not merely private or personal information. Thus, the very nature of asset declarations enables citizens to access information that would help them make rational choices and which is absolutely fundamental to a functioning democracy. It was further submitted that the highest state offices, i.e. those of the President and the Prime Minister cannot possibly invoke the first limb of Section 5 (1) (a) to claim that the information has no relationship to a public activity/ interest. Thus, it was submitted that the information requested is not '*personal information... which has no relationship to any public activity or interest*' as envisaged by the first limb of Section 5 (1) (a) (RTIC Minute of the Record, 26.06.2018).

Moving on to the second limb of the exemption applied i.e. whether it was an unwarranted invasion of privacy of the individual and the larger public interest is not served, the Appellant urged the Commission to balance the claim of unwarranted invasion of the privacy of the individual against the public interest served by disclosure. Further, a European Court precedent was noted to be of persuasive value; namely, *Wypych v. Poland* (25 October, 2005, application no. 2428/05) which discussed the impact of the disclosure of an Assets Declaration on the privacy of the local councillors vis a vis Article 8 of the ECHR which guarantees the right to privacy. The European Court of Human Rights declared that this does not amount to an over burdensome incursion into privacy and even though the information comes within the domain of privacy, such privacy is not an absolute right, and the limitation experienced by the individual was warranted given the public interest at large.

Thus it was maintained that this information has been recognized in the Indian and the European jurisdictions as being vital to enable a citizen to make rational choices about the democratic system within which an individual is placed. Counsel reiterated that therefore an Assets Declaration serves an important overarching function which is to provide the citizen with an opportunity to assess whether an individual has misappropriated funds over a period of time. It was further submitted that the President and Prime Minister ought to set an example by making the information requested publicly available.

In respect of the exemption cited in Section 5 (1) (g) of the Act and urging an analogy with the assets declarations of Supreme Court judges in India, *Secretary General, Supreme Court*

v Subhash Chandra Agarwal (12 January, 2010) the Appellant argued that as much as the Chief Justice of India cannot be in a fiduciary relationship to the judges of the Supreme Court, the President does not stand in a fiduciary relationship to the Prime Minister. It was finally contended that, in the event that the exemption under Section 5(1) (a) is sustained, anything that may fall within the privacy domain may be redacted as provided for by Section 6 of the Act as for example, if the information in an assets declaration contains details of a spouse or child which should not be in the public domain.

Responding to the Appellant, Senior State Counsel for the Respondents contended that, under and in terms of the DALL, disclosure may be permitted only under limited circumstances, that this is a special law governing a special purpose with a specific procedure laying down how and the points at which the assets should be disclosed with the corresponding duty of the person receiving that information to maintain secrecy.

Further, this law also contains provisions containing the imposition of penal consequences to those acting in breach thereto. It was argued that as a rule of construction, provisions of a general statute must yield to those of a special one which principle is contained in the maxim *Generalia specialibus non derogant* and that the special obligation to maintain secrecy under Section 8(1) of DALL supersedes the general obligations imposed by the RTI Act on public authorities (Vide paragraph 44 of the Written Submissions dated, 31/07/2017). In *Ghouse v. Ghouse* [1988] 1 SLR 25), this principle was summed up in the following terms,

“The principle of generalia specialibus non derogant sums up the presumption against implied repeal. A subsequent general act does not affect a prior special act by implication. A general provision should yield to a special provision. When a general act is subsequently passed it is logical to presume that the legislature has not repealed or modified the former special act unless it appears that the special act again, received consideration from Parliament.”

It was argued that if one is to contend implied repeal, there must be evidence in the text of the later enactment that shows that Parliament had in fact addressed its mind specifically to that specific former law and that it intended that provision of that law no longer apply in relation to this general law. Unless there is manifest intention of Parliament, it cannot be said that the RTI Act repeals by implication the secrecy provisions contained in the Declaration of Asset Law.

In conclusion it was submitted that therefore, the DALL is the Special Law and the RTI Law must defer to it insofar as any inconsistency between the two arises. He further submitted that there is every reason why the legislature did not contemplate the release of such information under the RTI Law, as it may contain information of very sensitive nature.

Addressing the question of severability in the event the exemptions are held to prevail in respect of some portions of the information request in issue, it was claimed on behalf of the Respondents that the Appellant is taking up a very different position to that taken by the appeal lodged, that the Commission is bound to determine the appeal arising from the refusal by the PA to give information as per the initial information request and that the Appellant Organisation cannot change the basis of its appeal.

In so far as the RTI Act was concerned, Section 5(1)(a) was invoked with particular emphasis. It was also stressed that it was not the position of the PA that there was a fiduciary relationship between the Prime Minister and the President but rather, that the information coming in to the hands of the Secretary to the President was in his capacity as a fiduciary under the President, entitling the Secretary (the DO) to plead the exemption under Section 5(1)(g) of the RTI Act.

In counter-response to the contention advanced on behalf of the Respondents that the application of the maxim *Generalia specialibus non derogant* privileged the DALL, the Appellant stated that, in view of the specific legislative intent in Section 4 of the RTI Act that "the provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail," the DALL cannot be given precedence, specially where no ambiguity exists. It was urged that the RTI Act itself be considered as a special law (Vide paragraph 4 of the Written Submissions of the Appellant dated 23/11/2018).

In any event and even considering that the RTI Act is a general law, the Appellant submitted that the RTI Act overrides the provisions of the DALL by virtue of the inconsistency between the two statutes. According to the legal maxim, *generalia specialibus non derogant*, a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.

Applying this principle, the Appellant's position was that the RTI Act which provides for the right to access to information of any citizen is clearly inconsistent with Section 8 (1) of the Declaration of Assets and Liabilities Law, No. 1 of 1975 which provides for the preservation of secrecy and non-disclosure of information with the consequent effect that Section 8 (1) of the Asset Declaration Law will be impliedly overridden by the RTI Act. The danger of a ripple effect if a contrary view is taken in regard to past laws inconsistent with the RTI Act was stressed.

Order on the Merits

This appeal arises in the context of the Designated Officer's (DO) decision under Section 31 (3) read with Section 32(1) of the RTI Act denying the requested information on the basis of Sections 5(1)(a) and (g) as 'it is exempted information.'

It must be emphasized at the outset that the duty laid on the DO under Section 31(3) to 'include the reasons' for a decision 'including specific grounds for the same' flows from the high degree of authority that the DO enjoys institutionally. Consequently, there is a duty to put on record, the fact that an information request has been seriously considered and that the denial has been in accordance with the statutory duty laid on a DO in terms of the Act rather than a bare reference to sub-sections of Section 5.

We are confident that, by including the terms 'specific grounds,' the legislative intention was to make a clear distinction between a duty to cite a provision of the law and the far more onerous duty to give 'specific grounds' for rejection which is perfectly in accordance with the paramount importance of the right to know, as declared constitutionally through Article 14A of the Constitution. The source of the right to information does not emanate from the RTI Act alone. It is a right that emerges from the constitutional guarantees under Article 14A. The RTI Act is an instrument that lays down statutory procedure in the exercise of this right and consequently, as the Supreme Court recently remarked, is conferred with a 'quasi-constitutional status' (Vide Supreme Court Determination on the Reparations Bill, SCM 26.07.2018, at p7). Its overreaching purpose is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and to hold the governors accountable to the governed.

This reading of the constitutional cum statutory provision is buttressed by Regulation 09 of the Right to Information Regulations gazetted on 3rd February 2017 (No 2004/66) where it is unequivocally stated that, when an information request is rejected, 'detailed reasons' for rejecting the request should be given. While this Commission takes cognizance of the fact that the IO and the DO of the PA were considering these requests at a time when the ink had scarcely dried on the new Act and thus any failures thereto may be regarded some understanding, these are salutary safeguards that must be observed for the future.

1) **In Relation to the certified copy of the Declaration of Assets and Liabilities of Prime Minister Ranil Wickremesinghe for the years 2015 and 2016.**

Threshold Question – Satisfaction of Section 3 of the RTI Act

The application of Section 3 of the Act (access to information arises only when a Public Authority is in 'possession, custody or control' of that information) read with the

Declaration of Assets and Liabilities Law, No. 1 of 1975 (as amended) must be dealt with at the outset. This is, to our minds, a threshold question in the context of this information request.

Sri Lanka has enacted a specific law which provides for the submissions of Declarations of Assets and Liabilities by specified categories of persons (emphasis ours), namely the Declaration of Assets and Liabilities Law, No. 1 of 1975 (as amended). This Law (hereafter referred to as DALL) prescribes a specific structure in respect of who is statutorily required to give such declarations and to whom the same may be given. Therefore the question as to disclosure of Declarations of Assets and Liabilities in the context of Right to Information merits more deliberate consideration than where an RTI law would operate sans such a specific law as would be the case in many countries in this region.

Section 4 (a) of DALL states that the declaration shall be made to the President (i) by the Speaker of Parliament, (ii) by Ministers of the Cabinet of Ministers, other Ministers and Deputy Ministers, (iii) by Judges and other public officers appointed by the President. Section 4 (b) states that the declaration shall be made to the Speaker by all other Members of Parliament not referred to in paragraph (a). Section 4 (ia) states that the declaration be made to the Commissioner of Elections by;

- (i) office-bearers of recognized political parties for the purposes of elections under the Presidential Elections Act, No. 15 of 1981, Parliamentary Elections Act, No. 1 of 1981, the Provincial Councils Elections Act, No. 2 of 1988, the Development Councils (Elections) Act, No. 20 of 1981 or the Local Authorities Elections Ordinance;
- (ii) candidates nominated for election at elections to be held under the Presidential Elections Act, No. 15 of 1981, the Parliamentary Elections Act, No. 1 of 1981, the Provincial Councils Elections Act, No. 2 of 1988, the Development Councils (Elections) Act, No. 20 of 1981 or the Local Authorities Elections Ordinance.

Declarations of Assets and Liabilities are not documents that are lightly entered into by individuals in public office. The analogy cannot be comparable to a situation where, as the Appellant sought to persuade us, a line Ministry decides to start drafting a law in which case, the ascertainment of whether that legal draft exists or not becomes an unquestionable matter of fact. A statutory duty has been prescribed by the DALL where Declarations of Assets and Liabilities are concerned and the Commission must be cognisant of the same. It is noted however that, at no point did the PA take up the objection in its responses by the IO or the DO that it did not, in fact, have the Declaration of Assets and Liabilities of the Prime Minister (emphasis added).

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In the hearings before the Commission, Counsel on behalf of the Respondents pursued the argument that the DO is not 'recognised' under the DALL as an 'appropriate authority' under and in terms of Section 4 of DALL and that therefore the Declarations are not within his 'possession, custody and control' to hand over to any citizen requesting access to information under the RTI Act. However this contention is defeated by the construction of certain provisions of the DALL, most particularly Section 5.

Section 5 (1) states that, 'any person, body or authority responsible for the appointment, promotion, transfer or secondment, of a state officer or employee of a public corporation or local authority, shall for such purpose, have the right to call for and refer to any declaration of assets and liabilities of such state officer or employee.' Section 5 (2) states that the Attorney-General, the Commission to Investigate Allegations of Bribery or Corruption, the Commissioner General of Inland Revenue and the Head of the Department of Exchange Control shall have the right 'to call for and refer to any declaration of assets and liabilities.' Most importantly for the context of this appeal, (by amendment brought in 1988), Section 5(3) states that 'any person shall, on payment of a prescribed fee to the appropriate authority, have the right to call for and refer to any declaration of assets and liabilities and on payment of a further fee to be prescribed, shall have the right to obtain a certified copy of such declaration.

That being so, Section 8 (1) of the DALL also mandates that that any person who obtains such information cannot communicate such matter to anyone except to the person the matter relates to. Contravention of Section 8 (1) is made an offence and subject to prosecution in the Magistrate's Court under Section 8 (4) of the Act. Instances where such declarations obtained by any person under Section 5 (3) may be produced in court are limited to proceedings instituted under DALL, the Bribery Act, the Exchange Control Act, the Inland Revenue Act and the Customs Ordinance.

Taking the scheme of the DALL *simpliciter*, it is manifest that declarations of assets and liabilities may indeed be provided to certain individuals, officers and even ordinary citizens upon the payment of a fee. If so, to whom is entrusted these duties of making available such declarations of assets and liabilities upon such a request under this Law if not, the responsible officers of the Public Authority under the direction of its head, namely the DO?

If so, should not the same officers (logically) be considered as having 'possession, custody and control' of the same under and in terms of Section 3 of the RTI Act? For the purposes of the instant component of this appeal (namely the Declaration of Assets and Liabilities of the Prime Minister), we therefore come to a finding that such Declaration is retained with the Public Authority named in this appeal, namely the Presidential Secretariat and the DO named in the appeal thereof. This, in our view, amounts to institutional possession of the

information asked for, satisfying 'possession, custody or control' of the requested information as envisaged by Section 3 of the RTI Act.

All powers, duties and responsibilities of the President prescribed in the Constitution and other relevant laws are vested on the President in his official capacity as President as opposed to his individual/private capacity as Maithripala Sirisena. Therefore, even in the given instance, when a declaration of assets and liabilities is made to the President, it is declared to him entirely in his official capacity because he holds the office of the President, which is to say that when the individual Maithripala Sirisena ceases to be the President of Sri Lanka, he cannot take with him the declarations so made.

Thus, as far as the possession, custody or control of such declarations is concerned, these would be with the office of the President, regardless of the individual who holds that office. As stated in its official website, the Presidential Secretariat "provides the administrative and institutional framework for the exercise of the duties, responsibilities and powers vested in the President." Therefore, any document given to the President in his official capacity ought to be in the lawful possession, custody and control of the Presidential Secretariat which is the physical embodiment of the office of the President, thus buttressing the institutional possession of the same.

Ruling of the Speaker

A Ruling by the Speaker of Parliament on 27th of February 2017 stating that information pertaining to asset declarations of parliamentarians can only be released through the procedure laid down in the Declaration of Assets and Liabilities Law was made available to the Commission upon a direction to that effect being made on 26.06.2018.

Even though the IO of the PA had cited the Ruling of the Speaker as a reason for refusing the information (response dated 06.03.2017), it is of particular note that the DO's response (after the Speaker's ruling dated 27.02.2018) on 20.03.2017 did not refer to the said Ruling but instead, cited Sections 5(1)(a) and (g) to deny the information. Despite the DO urging a different ground of denial, Senior State Counsel was permitted to cite the said Ruling in the hearings in line with the practice adopted by the Commission that PAs seeking indulgence to raise an exemption under Section 5 (1) of the RTI Act, not previously raised by the DO, will be permitted to do so in consideration of the equities of the matter and in order to deliver a fair Order as required of this Commission under the Act.

Thus, Senior State Counsel relying on the Ruling of the Speaker, cited Section 3(2) of the RTI Act (that the Act "shall not be in derogation of the powers, privileges and practices of Parliament") and Section 5(1)(k) of the RTI Act, ('that a request for information under the Act shall be refused, where the disclosure of such information would infringe upon the privileges of Parliament or of a Provincial Council as provided by Law') to justify the denial.

Further reliance was placed on Article 4 (C) of the Constitution which exempts privileges, immunities and powers of Parliament and of its members from judicial scrutiny together with Standing Order 142 which mandates that Standing Orders "can be regulated in such a manner as Mr. Speaker may from time to time direct." It was argued that the sum total of the constitutional and statutory provisions brings the Ruling of the Speaker within Section 5 (1) (k) of the RTI Act exempting information which would infringe the privileges of Parliament.

Assessing this reliance by the PA, we note that Section 4 (b) of the Declaration of Assets and Liabilities Law states that, "all other members of Parliament not referred to in Paragraph (a)" are required to declare their assets and liabilities to the Speaker. The word 'other' is included in this section because the preceding subsection *inter alia* refers to Cabinet of Ministers who are required to declare the same to the President. In other words and even if that was to be conceded, the Speaker's authority, if at all, would only apply to the class of persons who declare their assets and liabilities directly to him rather than in regard to those individuals who are required to declare to the President. This is so if we are to accept that an absurd situation should not arise where the Prime Minister makes two Declarations to both the President and the Speaker. Therefore, the Ruling issued by the Speaker appears not to be applicable to the Prime Minister who declares his assets and liabilities to the President under Section 4 (a) (ii) of the Law, consequently rendering the reliance by the PA before us on the said Ruling misconceived in law.

The question as to whether this Ruling applies to deny the Declarations of Assets and Liabilities of those who declare to the Speaker under Section 4(b) remains to be considered by this Commission in an appropriate case.

Reliance on Section 5(1)(a)

The determining factor when there is a clash between the right to information and the right to privacy is undoubtedly the public interest. Thus the question is whether the disclosure of the asset declaration of a high ranking elected official such as the Prime Minister serves the interest of the public?

In *Premalal Abeysekere v. Ministry of Education* (RTIC Minute of the Record, 20.04.2018), the Commission made a distinction between elected and un-elected public officials and found that elected officials are subjected to higher levels of public scrutiny which principle may also apply to un-elected public officials but with more circumspection. The fact that stringent duties of transparency in regard to declarations of assets applies without exception to elected public officials (politicians) is a standard commonly accepted for long elsewhere as evidenced very well in a 2002 judgment of the Supreme Court of India (*Union of India (UOI) v. Respondent: Association for Democratic Reforms and Another; with People's*

Union for Civil Liberties (PUCL) and Another v. Union of India (UOI) and Another, Decision: 2 May, 2002, 2002 AIR 2112; 2002 (3) SCR 294).

Here (in a decision delivered before the Indian RTI Act was passed in 2005), the Court required all electoral candidates to make public and submit on oath, details of movable and immovable assets owned by them, their spouses and their dependents, including liabilities like loans from public sector banks and unpaid bills for public utilities such as electricity, water and telephone connections.

Indeed, the position taken up by the Respondents that a strict condition of privacy governs the keeping of these Declarations and that disclosure may be permitted only under limited circumstances to particular named officials appears not be sustainable on the DALL itself. Despite the restrictions imposed by DALL on the 'communication' of declarations of assets and liabilities obtained, as aforesaid under Section 5(3), it is evident that the fact that citizens can ask for and obtain these Declarations by paying a fee under the DALL speaks to the fact that a blanket prohibition of secrecy in respect of these declarations to members of the public was not contemplated by this Law in the first instance.

Even so, this Commission is obliged to apply the principles of the RTI Act and that Act alone in deciding appeals before us. Even though accountability of public officials is a common objective of both the DALL and the RTI Act, the two laws approach that common objective in vastly different ways, including, but not limited to the maximum disclosure principle embodied in the RTI Act and the ability to disseminate the information so obtained without hindrance. While the familiar maxim of *generalia specialibus non derogant* stipulates that a later general law cannot override a previous special law, this is however not an absolute. In *Commissioner of Inland Revenue v. The Woodland (K. V. Ceylon) Rubber & Tea Company Ltd.* (S.C. 3/66-Income Tax Case Stated, BRA/333) it was cautioned that "the rule *generalia specialibus non derogant* is only a presumption and cannot be elevated to a rule of law, because no Parliament (of Ceylon) can bind a future Parliament." Indeed, there are additional exceptional circumstances during which a subsequent general law could override a previous special law as was made clear in *Ceylon Coconut Producers Co-operative Union v. C. Jayakody* (S. C. 14 of 1960-Labour Tribunal Case No. 2/1915);

"the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special Act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act." (emphasis added).

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Ajoy Kumar Banerjee v. Union of India (1984 3 SCC 127, 153) is also relevant on this point, holding that;

“a prior special law would yield to a later general law, if either of the two following conditions is satisfied:

- (i) The two are inconsistent with each other.
- (ii) There is some express reference in the later to the earlier enactment.

If either of these two conditions is fulfilled, the later law, even though general, would prevail.”

This position is further buttressed by another principle of interpretation: *leges posteriores priores contrarias abrogant*, which states that when a new law conflicts with an old one on the same or similar subject matter, the later law takes precedence and the conflicting parts of the earlier law becomes inoperable. As stated in *Ranawanagedara Mudiyanse v. Municipal Council Kandy* (7 NLR 167) (quoting 1 L. R. Q. B., 1892, 658, *Churchwardens of West Ham v. Fourth City Mutual Building Society*):

“The test of whether there has been a repeal by implication is this: are the provisions of the later Act so inconsistent or repugnant to the provisions of the earlier Act that the two cannot stand together? In which case, leges posteriores contrarias abrogant.”

The India CIC case of *Mr. M. R. Misra v. the Supreme Court of India*, (CIC/SM/A/2011/000237/SG) specifically dealt with laws that conflict with the RTI Act in that country:

“where there is any inconsistency in a law as regards furnishing of information, such law shall be superseded by the RTI Act. Insertion of a non-obstante clause in Section 22 of the RTI Act was a conscious choice of Parliament to safeguard the citizens' fundamental right to information...If the PIO has received a request for information under the RTI Act, the information shall be provided to the applicant as per the provisions of the RTI Act and any denial of the same must be in accordance with Sections 8 and 9 of the RTI Act only..”

Given the above, the Commission envisaged two scenarios:

1. An earlier law/ rule whose provisions pertain to furnishing of information and is consistent with the RTI Act: Since there is no inconsistency between the law/ rule and the provisions of the RTI Act, the citizen is at liberty to choose whether she will seek information in accordance with the said law/ rule or under the RTI Act. If the PIO has received a request for information under the RTI Act, the information shall

be provided to the citizen as per the provisions of the RTI Act and any denial of the same must be in accordance with Sections 8 and 9 of the RTI Act only; and

2. An earlier law/ rule whose provisions pertain to furnishing of information but is inconsistent with the RTI Act: Where there is inconsistency between the law/ rule and the RTI Act in terms of access to information, then Section 22 of the RTI Act shall override the said law/ rule and the PIO would be required to furnish the information as per the RTI Act only."

We find these sentiments to be entirely applicable in the context of Sri Lanka's RTI Act. Otherwise, as this Commission observed during the course of the hearing of this appeal, (Minute of the Record 31/10/2018), allowing the existing range of special laws to supersede provisions of the RTI Act would ultimately render the RTI Act futile. This is a consideration that must anxiously weigh with us.

It is therefore our view that the spirit and letter of the RTI Act brought into Sri Lanka's statute books in 2016 with the modern objective of 'combating corruption and promoting accountability and good governance' (vide preamble to the RTI Act) cannot effectively operate if Section 8(1) of the DALL continues to be concurrently valid. It was precisely to address this situation that Section 4 of the RTI Act provides that; "The provisions of this Act shall have effect notwithstanding anything to the contrary in any other written law and accordingly in the event of any inconsistency or conflict between the provisions of this Act and such other written law, the provisions of this Act shall prevail." This, we find, falls within the four corners of the caution that, the *generalia* maxim will not apply if there is "...something in the nature of the general one making it unlikely that an exception was intended as regards the special Act." (*Ceylon Coconut Producers Co-operative Union v. C. Jayakody, supra*)

Applying Section 4 to its fullest extent is important because of what the RTI Act undertakes to achieve through fostering 'a culture of transparency and accountability' (Vide preamble to the Act). If Parliament had intended to keep asset declarations out of the purview of the RTI regime, it could have explicitly mentioned it or included the same as an exemption under Section 5 of the RTI Act. That was not evidenced. In such circumstances, the Commission is duty bound to take into due account, the legislative intention in that regard.

We do not accept the argument advanced on behalf of the Respondents that existing law would suffice to curb corruption and the unexplained acquisition of wealth of elected public officials through scrutiny of declarations of assets and liabilities and that the provisions of the RTI Act need not therefore be used for this purpose. Existing laws, such as the DALL, would only come into play only upon complaints being received on corrupt acts of individuals or when the same is discovered inadvertently. As practice indicates, this occurs only in selected instances. In contrast, the RTI Act enables a powerful check to be

exercised on even potential corruption as this would deter those otherwise enticed to amass public wealth for themselves.

In instances where Section 5(1)(a) is urged to deny information, it is an important factor that this Section contains the public interest embedded within the exemption itself. We find that, on a consideration of Section 5(1)(a) itself, that the public interest in this matter outweighs the claim of unwarranted invasion into the privacy of an individual. In any event, we find that Section 5(4) containing the general public interest override will apply to support the release of the information requested.

Reliance on Section 5 (1) (g) of the Act

The PA has cited the exemption under Section 5 (1) (g) of the Act to deny the requested information, namely a fiduciary duty. It is, of course, clear that the constitutional scheme (in the wake of the 19th Amendment to the Constitution) does not contemplate that the President stands in a fiduciary relationship with the Prime Minister. In the hearings of the appeal, it was argued on behalf of the Respondents that the information held by the Secretary to the President was 'required to be kept confidential by reason of the existence of a fiduciary relationship' vis a vis the President and further, that the duty to uphold secrecy in Section 8(1) of DALL is encompassed within Section 5 (1)(g).

In *Reserve Bank of India v. Jayantilal N. Mistry* (16 December, 2015) the four scenarios in which a fiduciary relationship arises were laid out in the following manner;

- (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first,
- (2) when one person assumes control and responsibility over another,
- (3) when one person has a duty to act or give advice to another on matters falling within the (e.g. lawyer client relationship) scope of the relationship, or
- (4) when there is specific relationship that has traditionally be recognized as involving fiduciary duties (doctor-patient relationship), as with a lawyer and a client, or a stockbroker and a customer."

It is manifest that none of the above scenarios envisage a situation where the Secretary to the President (DO) stands in a fiduciary capacity to the President. Indeed, if this Commission were to hold that a fiduciary relationship arises between a superior official in a public authority and his subordinate who is in possession of the information owing to administrative reasons, then the purpose and objective of the RTI Act would be rendered a dead letter as this could be, for example, pleaded by a Secretary to a line Ministry vis a vis the relevant Minister.

In any event, given that the DALL itself enables declarations of assets and liabilities to be provided to citizens by officers of the PA upon the payment of a fee (Section 5(3)), the argument that a fiduciary duty prohibits the same from being handed over by the Secretary to the President where the RTI Act is concerned, cannot be justified. We hold that Section 5(1)(g) is not applicable to deny the information requested. The findings of India's Central Information Commission (CIC), in *SC Agrawal v. Prime Minister's Office case* (Appeal No. CIC/WB/A/2009/00038 & WB/C/08/868 dated 7-2-09 & 25-8-2008) in regard to the assets details of Cabinet Members to the Prime Minister's Office (PMO) are very apt in the instant appeal as well;

"...to argue a fiduciary relationship in submission of such statements to PMO, when such statements have in any case under law also to be made available at the time of election before the Election Commission of India, is not in our view a valid argument."

Conclusion

It is therefore evident that none of the exemptions pleaded by the PA stand.

Section 6 of the RTI Act allows for information to be redacted by the PA as it may deem fit. The Appellant has specifically pleaded before this Commission that the information asked for will be satisfied if the information relevant to the Prime Minister alone in the Declaration of Assets is directed to be released and any other parts of that Declaration may be redacted under Section 6. We see no merit in the submission for the Respondents that pursuing severability at this stage would fundamentally alter the character of the information request. If that was to be upheld and considering the fact that, in many appeals before us (ie; as one illustration, *Airline Pilots Guild v. Sri Lankan Airlines*, Order delivered on 12.06.2018), the decision as to severability arises upon the Commission's own assessment of the information that may or may not be disclosed under the RTI Act, the handling of the appeals process would be severely restricted.

Given that Section 6 would sufficiently safeguard the privacy rights of those related to the elected public official whose Declaration of Assets and Liabilities is being requested, the Public Authority is directed to hand over to the Appellant, those extracts of the Declaration of Assets and Liabilities of the Prime Minister with the redaction of the content relating to any other related individual for the years 2015 and 2016. It must be noted that this holding as to severability in terms of Section 6 is in consequence of the Appellant's submission in this instant appeal and that this is not say that this will be applied as a general principle in appeals of this nature.

Finally, where the argument advanced on behalf of the PA that the Appellant has failed to demonstrate that the information sought is required for the exercise and protection of a citizen's right is concerned, we are of the view that this superimposition of an additional

requirement to deny information apart from those specific exemptions listed in Section 5(1) is not tenable under the RTI Act.

2) In Relation to the certified copy of the Declaration of Assets and Liabilities of President Maithripala Sirisena for the years 2015 and 2016

As aforesaid, the DALL lists the specific classes and description of persons who are required to declare their assets and liabilities. This list exempts from mentioning the President of Sri Lanka *qua* President as one of the categories of persons who is required to declare his/her assets and liabilities. The only point at which the individual who is President of Sri Lanka is legally obliged to declare his/her assets and liabilities is under Section 4 (ia) (ii) of the same law when he/she is a presidential candidate. Once such an individual is elected as President, he/she is exempted from making such declaration during the tenure of the Presidency.

We are in agreement with the submission of the state law office appearing for the Respondent that Section 4 (ia) (ii) is inapplicable to the President once he assumed office on the 9th of January 2015.

In his appeal before the Commission, the Appellant had stated that the information requested ought to be available with the Commissioner of Elections to whom, the President should have declared his assets and liabilities as the leader of a recognized political party. It was contended that as per Regulation 4, Clause 6 of the RTI Regulations (gazetted under Gazette No. 2004/66 dated 03.02.2017)

"if the request relates to information which the Information Officer is aware is held by another Public Authority, the Information Officer shall duly in written format transfer the request to the concerned Public Authority and inform the citizen making the request accordingly within 7 days from the date of receipt of the request"

However, this information request was not for the declaration of assets and liabilities of a presidential candidate but for the President *qua* President for the years 2015 and 2016 which the law does not oblige him to retain/give. In any event, such a document would certainly not be in the possession, custody or control of the Commissioner of Elections.

Therefore, given that there is no law which requires the President *qua* President of Sri Lanka to make a declaration of his/her assets and liabilities, the specific information requested by the appellant i.e., a certified copy of the Declaration of Assets and Liabilities of President Maithripala Sirisena for the years 2015 and 2016, the same cannot lawfully be in the possession, custody or control of the Presidential Secretariat or any other Public Authority.

At the Right to Information Commission of Sri Lanka

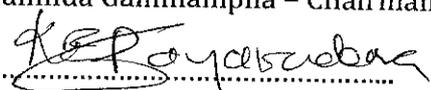
That being so, it is relevant to state that the increasing trend among Heads of State is to proactively declare their assets and liabilities to foster a practice of transparency and public accountability. Therefore, even if the law as it is does not require the President to declare his assets and liabilities, amendments to the existing law to enable the same would undeniably foster a culture of public accountability and good governance as envisaged by the RTI Act. This is a lacunae in the law which should be redressed forthwith.

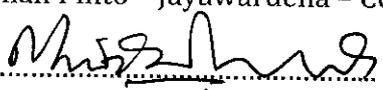
The decision of the Designated Officer is affirmed on this portion of the information request.

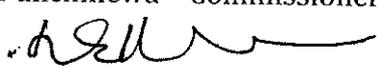
Order is directed to be conveyed to both parties in terms of Rule 27 (3) of the Commission's Rules on Fees and Appeal Procedures (Gazette No. 2004/66, 03.02.2017).

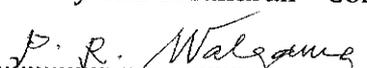
The Appeal is concluded.


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Mahinda Gammampila - Chairman


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Kishali Pinto - Jayawardena - Commissioner


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S.G. Punchihewa - Commissioner


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Dr. Selvy Thiruchandran - Commissioner


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Justice R. Walgama - Commissioner

Right to Information Commission